

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF DELAWARE

FOUNDRY NETWORKS, INC.,)
)
Plaintiff,)
v.)
)
ALCATEL USA RESOURCES, INC.,)
ALCATEL INTERNETWORKING, INC.,)
COMPAGNIE FINANCIÈRE ALCATEL, and)
ALCATEL S.A.,)
)
Defendants.)

C. A. No.: 06-470-SLR

**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION
FOR EXTENSION OF TIME TO SERVE AND FILE REPLY BRIEFS
IN SUPPORT OF MOTIONS TO DISMISS**

I. The Relevant History of the Briefing At Issue and the Settlement in Principle.

On October 11, 2006, Defendants Alcatel and Compagnie Financière Alcatel filed a Motion to Dismiss for Lack of Personal Jurisdiction (D.I. 30), and Defendants Alcatel USA Resources, Inc. and Alcatel Internetworking, Inc. filed a Motion to Dismiss Amended Complaint (for failure to state a claim) (D.I. 35). Foundry requested and the Defendants (collectively referred to herein as "Alcatel") agreed to an extension of time for Foundry to respond to those motions to dismiss from October 25, 2006 to November 22, 2006. In view of the fact that Foundry was going to serve its answering briefs the day before Thanksgiving, the parties further agreed that Alcatel's deadline to serve and file its reply briefs would be extended from November 30, 2006 to December 11, 2006.

Foundry did serve and file its answering briefs on November 22, 2006. On or about December 1, 2006, Foundry and Alcatel reached an agreement in principle to settle

this case and the patent case that Alcatel USA Resources, Inc. and Alcatel Internetworking, Inc. filed against Foundry in this district (C.A. No. 05-418-SLR). Due to the impending settlement, Alcatel asked its counsel to suspend work on this case, particularly on the reply briefs, and to focus on the settlement. Not knowing how long it would take to finalize and sign the settlement documents, not wanting to file multiple requests for extensions of time, and taking the upcoming holidays into account, Alcatel asked Foundry to agree to a one-month extension of the deadline for Alcatel's reply briefs, to January 11, 2007. Foundry refused and countered only with a one-week extension.

II. In Light of the Pending Settlement, Foundry Presents No Valid Basis to Deny Alcatel a Reasonable Extension of Time on Its Reply Briefs.

A. A December 18 Closing Date for the Settlement is Unduly Optimistic.

In its response to Alcatel's motion for extension of time, Foundry suggests that it is necessary to hold Alcatel's "feet to the fire" with one-week extensions of time, to be provided only if Alcatel negotiates settlement in good faith. This is simply not true. For one thing, Magistrate Judge Thyng has closely assisted the parties with their settlement negotiations and surely stands ready to address any complaint about undue delays. More importantly, Alcatel is acting diligently and in good faith in finalizing the details of the parties' settlement. Indeed, Alcatel has honored its commitment to provide to Foundry "by early this week" new versions of a settlement agreement and a related agreement with all of Alcatel's comments on Foundry's prior drafts of those agreements.

Foundry's suggestion that the settlement can be fully documented, consummated, and the appropriate stipulations of dismissal filed by December 18 is simply unrealistic.

This is not a straightforward situation involving only a settlement payment and exchange of releases. To the contrary, the settlement involves two civil actions, a myriad of claims and defenses, multiple corporate parties, and the drafting of several sophisticated agreements.

Alcatel has proposed an effective date of January 1, 2007 for those agreements so that Alcatel will have sufficient time to obtain all of the necessary signatures. This process is made somewhat more complicated by the fact that, effective December 1, 2006, Alcatel merged with Lucent Technologies, Inc. and there have been management changes as a result of the merger. In any event, Alcatel awaits Foundry's responses to Alcatel's proposed modifications to the settlement agreement and other agreement, and is prepared to conduct any necessary additional negotiations promptly.

B. There Is No Prejudice to Foundry in Allowing Alcatel a Typical, Reasonable Extension of Time on Pending Briefing in Order to Finalize a Settlement.

Foundry also argues that a one-month delay would be extremely prejudicial to Foundry should the settlement talks fail: "Every day of delay puts Foundry in a worse position given the extant deadlines in the related patent case." Of course, Foundry provides no specifics. Moreover, Foundry does not explain why it could take an additional month to respond to the motions to dismiss without prejudicing its interests in the patent case, but the extension of time Alcatel now seeks would have that effect. Foundry's assertion is particularly weak in light of the fact that the Court has recently, after fervent importuning from Foundry, extended the schedule of the patent case by five and a half months. *See, e.g.*, D.I. 195 in C.A. No. 05-418-SLR (transcript of October 4, 2006 discovery conference), at pp. 49-54.

In any event, if the settlement process does ultimately fail and Foundry can prove with specificity that it was harmed by its own decision to suspend or delay any work on the patent case because of the settlement negotiations, then Foundry could seek relief from the Court. Meanwhile, the likelihood that the settlement will be consummated promptly is greater if the parties remain focused on the settlement papers. Forcing Alcatel to proceed with the “sword of Damocles” over its head, based on the risk that it might be forced to file its reply briefs on short notice during the holiday season if Foundry refuses to dole out further one-week extensions, is simply counterproductive.

In conclusion, Alcatel respectfully requests that the Court grant its motion for a one-month extension of time (to January 11, 2007) to file its reply briefs.

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Dated: December 12, 2006

CERTIFICATE OF SERVICE

I, Karen L. Pascale, Esquire, hereby certify that on December 13, 2006, I caused to be electronically filed a true and correct copy of the foregoing document with the Clerk of the Court using CM/ECF, which will send notification that such filing is available for viewing and downloading to the following counsel of record:

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I further certify that on December 13, 2006, I caused a copy of the foregoing document to be served by e-mail and hand delivery on the above-listed counsel of record, and on the following non-registered participants in the manner indicated:

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